Supreme Court, U.S.
FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Darlene Esposito - PETITIONER,

Vs.

SECRETARY OF HEALTH AND
HUMAN RESOURCES,
Donna E. Shalala.

Department of Labor,
Division of Workers Compensation.

Department of labor,
Board of Review.

The United States - RESPONDENTS.

PETITION FOR PREROGATIVE WRIT

TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Darlene Esposito
1924 Elizabeth Avenue
Apt. 5
Rahway, New Jersey 07065

23 pp

QUESTIONS PRESENTED

The orders of the Third Circuit Court of Appeals determined in their findings of the jurisdictional statement dated October 22, 1993 denied and affirmed the judgment rendered in the District Court. The jurisdictional statement dated December 7 1993, denied rehearing. Dose the rules of Title 28 U.S.C. 18,19,20 rules that apply to Joinder of Claims of Remedies, Joinder of Persons needed for Just Adjudication and Permissive Joinder of Parties Apply?

Plaintiff's plea, that fact or law are common to claims against such parties and that parties may be joined for claims arising under the same transactions and occurrences, plaintiff questions the Secretary of Health and Human Resources

they are not being answered satisfactory.

Dose code 20 of Federal Rules 404.408 (c)(2) (ii) and 404.408 (i) in relation to state plan DS1 benefits and interrupted workers compensation offset amounts raise her benefit amount?

The DS1 state plan and Social Security primary insurance benefits lean toward unemployment benefits act. Statutes NJS 43:21-43:56 are to read and construed together. Is plaintiff found by the state of New Jersey to be disabled? or unemployed?

Plaintiff, dose not receive under Title II of Sec. 224(a) of the Social Security Act 80 percent of her average predisability current earnings. Dose the state of New Jersey file disabilities under the Act of Congress known as the Pension Reform Act?

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DARLENE ROSE ESPOSITO,
Petitioner,
V.

SECRETARY OF HEALTH AND
HUMAN RESOURCES,
Donna E. Shalala.

Department of Labor,
Division of Workers Compensation

Department of Labor,
Board of Review

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR PREROGATIVE WRIT
TO THE UNITED STATES
SUPREME COURT

Petitioner Darlene Rose Esposito respectfully prays that a Prerogative Writ issue to review, the opinion and judgment on Mandate by the United States Court of Appeals for the Third Circuit on January 26, 1994.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

There was a petition for rehearing in banc and panel rehearing to the Third Circuit Court of Appeals, petition was denied on December 7, 1993.

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OPINION BELOW

The published opinion of the Court of Appeals, styled Darlene Esposito v. Secretary of Health and Human Resources, Donna E. Shalala, (3rd Cir, 1994) , was entered on January 26, 1994. A copy of the mandate is attached as Appendix B-8

On December 7, 1993, the Court of Appeals denied appellant's suggestion for rehearing in banc and panel review. A copy of the order is attached hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Third Circuit

Darlene Esposito v. Secretary of Health and Human Resources etal. was entered on October 22, 1993 there after on December 7, 1993, appellant's suggestion for stay of mandate was denied. Jurisdiction of this Court is to review the judgment in question through Prerogative Writ is conferred by 28 U.S.C. 1651 (a)

CONSTITUTIONAL PROVISION INVOLVED

This action arises under the fourteenth amendment to the constitution more specifically section one and four:

Section 1.) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4.) The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for service in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or claim for loss or emancipation of any slave; but such debts, obligations and claims shall be held illegal and void.

Section five of the fourteenth amendment provides:

The Congress shall have power to enforce this article by appropriate legislation. This action arises under the Act of Congress commonly known as the Pension Reform Act of 1974.

The Doctrine of Ancillary Jurisdiction is condition to be within the jurisdiction of this Court is invoked under and is conferred by U.S.C. title 28 ¶18, ¶19, and 20 of federal rules of civil procedure.

That a question of Law or Fact is common to claims against such parties.

That all parties may be joined for claims arising under the same transaction or occurrences.

That defendant's reversible error is substantially affecting petitioner's rights and obligation which if uncorrected would result in a miscarriage of justice and which justifies reversing the judgment of the U.S. Court of Appeals For the Third Circuit.

Darlene Esposito v. Secretary of Health and Human Resources etal.

STATEMENT OF THE CASE

Darlene Rose Esposito was hurt as a result of an automobile collision on November 3, 1986. She collected periodic benefits under the state law plan known as State Disability Benefits (DS1) plainitff collected periodic benefits in the total of $664.00 payable twice a month.

The state plan by way of statute runs for a term of twenty six weeks. After the twenty six weeks she was not found by the State of New Jersey to be disabled though confined to out patient hospital therapy treatments the month her benefits expired.

Darlene Esposito v. Secretary of health and Human Resources etal.

There was no determination of disability to continue any benefit by the Department of Labor, Board of Review, Department of Labor Division of Workers Compensation. There was no qualification for a (SSI) supplemental security payment while her (SSD) social security disability was processed. She was eligible through SSD May 1987. The case was remanded to the ALJ and she received a payment in October of 1989. The amount of her first benefit was $329.00 contrary to Title II of the Social Security Act ¶215 (a)(2)(C).

> In the case of an individual who was entitled to a disability insurance benefit for any, month, and with respect

> to whom a primary insuance amount is required to be computed at any time after the close of the period of the individual's disability (weather because of such individual's subsequent entitlement to old-age insurance benefits or to a disability insurance benefit based upon a subsequent period of disability, or because of such individual's death), the primary insurance amount so computed may in no case be less than the primary insurance amount with respect to which such former disability insurance benefit was most recently determined.

Authorities used in the brief for the Secretary of Health and Human Services for the Appeals Council are formulated under U.S.C., Title II of the Social Security Act. The attorney's for the secretary of health and human services are using Code of Federal Rules herein different to U.S.C. ¶215(b)(B)(iii) and C.F.R. ¶404.211(e)1 is the age to process calculations in the

number of years of earnings used in determining the monthly average of the indexed earnings. Age 21 to 22, and herein different , defendants brief list of year 1984. This is erroneous plaintiff became eligible to benefits in 1987, plaintiff became eligible for payment after a 17 month waiting period and the evidence of U.S.C. ¶215(a)D(2)(A) shall be counted the year individual's eligibility for disability insurance benefit for any of the 12 months immediately preceding the month of eligibility to which she was entitled during such 12 months. So-- August 1988 entitled, twelve months preceding, is September 1987. Plaintiff became eligible in 1987. And

Darlene Esposito v. Secretary of Health and Human Services etal. received Primary Insurance benefits in October 1989. Plaintiff was not even disabled in 1984 she was healthy.

Temporary State Disability and Social Security form together under one title [N.J.S.A.¶43:21-25 to ¶43:21-56] there is a relation to Social Security and Article 2 Temporary Disability Benefits Law. And it is mandatory in nature of this mentioned article that the employer must participate in either state plan or qualified private plan of disability benefits. And each worker shall also contribute into the fund 1% of his/her wages with respect to his employment with an employer. Plaintiffs

Darlene Esposito v. Secretary of Health and Human Services etal. automobile accident occurred while she was employed it was in normal morning business hours, she was hit by a fellow state employee, and a out of state motorist, her travel on November third, 1986 was in the course of her employment, she did not receive a workers compensation benefit under Title 34 New Jersey Labor and Workers Compensation Law that enables and provides measurements of the permanency of disability be made after twenty six weeks of medical treatment, has been completed. There was no determination from the State of New Jersey to conform there was a

Darlene Esposito V. Secretary of Health and Human Services etal.

disability.

Plaintiff, filed a notice of motion entered into the U.S. Court of Appeals for The Third Circuit from the conditions of an order of the U.S. District Court affirming the findings of The Secretary of Health and Human Services. As too filed within the notice of motion was to include Joinder of Related Parties and Proceedings, this is not found to conforming to the attorney's brief for the Secretary of Health and Human Resources, now knowing there is no mention of U.S.C. Title II section ¶218, ¶221, ¶224 in the original brief or reply brief in relation to state benefits and workers

compensation or interrupted workers compensation nor even of Title II Section ¶209(a)(k) which reads for an important part of benefits paid before Primary Insurance Benefits.

The struggle of the argument basis is the defendants non-mention of the major stressed questions that relate to all parties and proceedings.

REASON FOR GRANTING THE WRIT

Plaintiff findings found that all the evidence of Title II of the Social Security Act and the Authorities of section ¶215(2)(C) ¶218 A(1)(b)(5)(C) or (D), ¶218 c 1 B(4), ¶224(a) to ¶224(c)(8) which relate to mere mention

Darlene Esposito v. Secretary of Health and Human Resources etal.

of a persons disability to the Secretary of Health and Human Resources from state agencies now known as the Department of Labor, Board of Review were not applied and Code of Federal Rule and the Regulation to interrupted workers compensation ¶404.408(c)(2)(ii) and ¶404.408(i) were not applied.

Plaintiff findings found that all evidence of Title II of the Social Security Act and the authorities of section ¶209(a)(2)(a)(B), ¶215(f) (4), that a amount is under paid in excess of one dollar.

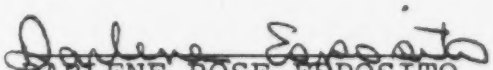
Darlene Esposito v. Secretary of Health and Human Resources etal.

CONCLUSION

An agreement should be reached to give federal state agreement and to endow plaintiff, payments 80% of her average pre-disability current earrings.

Plaintiff, is an ordinary person and follows the path that the constitution persuades and it is plaintiffs belief if the errors mentioned are not reviewed or remanded are violations of the Social Security by-laws and are harming the health and welfare of the plaintiff.

Respectfully Submitted



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APPENDIX - A

PUBLISHED

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Darlene Esposito

Plaintiff-Appellant,

V.

Secretary of Health and Human Resources etal.

Defendant-Appellee.

Appealed from the United States District Court for the District of New Jersey.

Dickinson R. Debevoise District Judge

Argued/Filed: August 20, 1991

Judgment Decided: March 22, 1993

2 Darlene Esposito v. Secretary of Health and Human Resources etal.

Before The United States Court of Appeals For The Third Circuit.

no. 93-5191

Before Stapleton, Hutchinson, and Roth Circuit Judges, Affirmed the opinion of The United States District Judge for the District of New Jersey.

COUNSEL

Michael Chartoff United States Attorney Newark New Jersey, Peter G. O'Malley Special Assistant United States Attorney Newark New Jersey, Annette H. Blum, Stephen P. Conte, Office of General Counsel Department of Health and Human Services.

OPINION

DEBEVOISE, District Court Judge:

A reviewing court must accept findings of fact by the Secretary if those findings are supported by "substantial evidence." 42 U.S.C.¶ 405(g); 42 U.S.C.¶ 1383(c)(3) .

The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,.

Third Circuit has developed certain rules to scrutinize the evidentiary basis for administrative findings:

> [D]ecisions make clear that determination of the existence vel non of substantial evidence is not merely a quantitative exercise. A single piece of

> evidence will not satisfy the substantiality test if the Secretary ignores, or fails to resolve, a conflict created by countervailing evidence. Nor, is evidence substantial if it is overwhelmed by other evidence particularly certain types of evidence (e.g. that offered by treating physicians) or if it really constitutes not evidence but mere conclusion... The search for substantial evidence is thus a qualitative exercise without which our review of social security cases ceases to be merely deferential and becomes instead a sham.

Health and Human Resources etal.

Plaintiff objects to the ALJs' decision on grounds that her disability benefit were calculated incorrectly and should have been equivalent to the amount which she had previously received from the New Jersey Department of Labor. I find that the ALJ did not err in computing plaintiff's disability benefits because record, taken as a whole, contains substantial evidence to support the Secretary's findings. For these reasons I affirm.

It is well settled in the Third Circuit that the ALJ should assume a more active role when the claimant is unrepresented and thus the ALJ has a

hightened duty of care and responsibility in such instances. Notwithstanding the tortured procedural history of this case, the ALJs have fulfilled this duty by indicating not only the evidence supporting their factual conclusions, but also the evidence that was rejected.

Moreover, each of their decisions provided a through explanation of the methods used to calculate plaintiff's benefits.

CONCLUSION

Plaintiff's application for increased disability benefits is denied and the decision of the Secretary is affirmed.

Dated: March 22, 1993.

APPENDIX - B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RECORD NO. 93-5191

DARLENE ESPOSITO

Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND
HUMAN RESOURCES
Donna E. Shalala etal.

Defendant-Appellee.

PETITION FOR REHEARING IN BANC

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY

DARLENE ESPOSITO
1924 Elizabeth Avenue
Apt. 5
Rahway, NJ 07065

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DARLENE ESPOSITO Plaintiff-Appellant, v. SECRETARY OF HEALTH AND HUMAN RESOURCES Donna E. Shalala DEPARTMENT OF LABOR, Division of Workers Compensation DEPARTMENT OF LABOR, Board of Review THE UNITED STATES Defendant-Appellee.	No. 93-5191 PETITION FOR REHEARING IN BANC

Darlene Esposito, Certifying in lieu of oath, desposes and sayes:

The appellant Darlene Esposito, respectfully submits that appellant found on

page five and seven of defendant's drief's tells of year 1984 the year is erroneous to the year appellant became eligible to benefits. Eligibility came after a seventeen month waiting period. Particular Points of Law U.S.C. Title ¶215(a)(D)(2)(A).

The issue of Joinder of Related Parties and Proceedings is not conforming in the attorney's brief's for the Secretary of Health and Human Resources. Particular Points of Law F.R.A.P. Rule ¶18 and ¶19 and ¶20.

That, there is no mention of law or fact common to the claims of Title II U.S.C. ¶224, ¶221 or ¶218 in the original brief or the reply brief in relation to state benefits and workers compensation or interrupted workers compensation, nor even

of Title II section ¶209(a)(k) which reads for an important part benefits paid before Primary Insurance Benefits.

It is appellants request that the section that apply to her major stressed questions, that relate to all parties and proceedings be included in the defendant's brief's so all topic of question can be settled. Particular Points of Law C.F.R. 20 ¶416.1476(b) and C.F.R. 20 ¶404.976(b)

Agreement should be reached to give federal state agreement and to endow appellant under the points of law Title II U.S.C. ¶221 and ¶224 of the Social Security Act.

CONCLUSION

This appeal is based on a question of exceptional importance, to-wit a restitution of causes by the Court in banc will suppress the filing of a petition in to the Supreme Court.

Respectfully submitted, this the _____ day of November, 1993.

DARLENE ESPOSITO
1924 Elizabeth Avenue
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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Petition for Rehearing In Banc was mailed, First Class United States Postage, to Peter G. O'Malley, United States Attorney for the District of New Jersey, This the _____ day of November, 1993, properly addressed as follows:

United States Attorney
C/O Peter G. O'Malley
For The District of New Jersey
970 Broad Street Newark, New Jersey 07102

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5191

DARLENE ESPOSITO,

Appellant

v.

SECRETARY OF HEALTH AND HUMAN RESOURCES,
DONNA E. SHALALA

SUR PETITION FOR REHEARING

Before: SLOVITER, CHIEF JUDGE, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRCIA, COWEN, NAGAARD, ROTH, AND LEWIS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having

been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: December 7, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5191

DARLENE ESPOSITO, APPELLANT

VS.

SECRETARY OF HEALTH AND HUMAN RESOURCES,
Donna E. Shalala

It is **O R D E R E D** that the motion for stay of mandate is **DENIED** because no substantive right of the applicant will be affected by failure to grant the stay of mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

_____
Circuit Judge

Dated: January 26, 1994